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IN THE

Supreme Court of the United States

October Term, 1961

No. 854

JAMES F. TORRANCE,
Petitioner

v.

JOSEPH SALZINGER, Warden of the Dauphin County Prison, and WESLEY M. BARRICK, Sheriff of Dauphin County, Pennsylvania,
Respondents

BRIEF FOR RESPONDENTS IN OPPOSITION

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James F. Torrance,

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Joseph Salzinger, Warden of the Dauphin County Prison, and Wesley M. Barrick, Sheriff of Dauphin County, Pennsylvania,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS IN THE COURTS BELOW

The opinion of the District Court denying Petitioner's application for a writ of habeas corpus is reported at 195 F. Supp. 804 (M.D. Pa. 1961). The opinion of the Court of Appeals, affirming the judgment of the District Court is reported at 297 F. 2d 902 (3rd Cir. 1962).

STATEMENT OF THE CASE

Petitioner was convicted in the Court of Quarter Sessions of Dauphin County, Pennsylvania, on indictments charging him with conspiracy to defraud the Pennsylvania Turnpike Commission, of which he had been a member and secretary-treasurer, and misbehaviour in office as a member of the Commission. These convictions were affirmed by the Dauphin County Court, sitting en banc, *Com. v. Evans et al.*, 72 Dauph. 31 (1958). The convictions were affirmed by the Superior Court of Pennsylvania, except for one count of the misbehaviour indictment, 190 Pa. Superior Ct. 179 (1959). The decision of the Superior Court was affirmed by the Supreme Court of Pennsylvania, 399 Pa. 387 (1960). This Court denied certiorari, 364 U.S. 899 (1960), and also denied a petition for rehearing, 364 U.S. 939 (1961).

At each step of these proceedings on direct appeal, petitioner raised the issue, now tendered to this Court for the second time, namely, the allegation that he was denied due process because of the admission in evidence at a joint conspiracy trial of a prior statement of a co-defendant, Paul. The Paul statement was admitted in evidence *solely* against that co-defendant, under careful and oft-repeated instructions from the trial judge that the statement was not evidence against any of the other defendants, including the petitioner.

After this Court denied certiorari on that and other issues, petitioner sought a writ of habeas corpus in the

United States District Court for the Middle District of Pennsylvania, alleging that he was deprived of due process by pretrial publicity, by admission of the Paul statement, and by the fact that there was no evidence rationally sustaining his convictions. The application was denied by Judge Follmer and the denial was affirmed by the Court of Appeals for the Third Circuit, in an opinion by Judge Hastie. As to the sufficiency of the evidence, the Court of Appeals held that petitioner had not exhausted his state remedies, whereupon he applied to the Supreme Court of Pennsylvania, for a writ of habeas corpus on that issue, and after hearing, his application was denied, *Com. ex rel. Torrance v. Salzinger*, 406 Pa. 268 (1962). That decision is the subject of a petition for certiorari to this Court, filed simultaneously with this one.

As to the other two grounds, namely, the pretrial publicity and the admission of the Paul statement, the Court of Appeals held that they were without merit.

In the present petition, petitioner has abandoned the issue of pretrial publicity, and presses only the issue of the admission of the Paul statement.

The petitioner's codefendants have not attacked their convictions by federal process and are presently serving their sentences.

Fragment

ARGUMENT

It is undisputed that the trial judge cautioned the jury on many separate occasions that the statement of petitioner's co-defendant, Paul, was to be considered against that co-defendant *only* and not against any other defendant. This was handled in conformity with established practice in the state courts, as Judge Follmer points out in his opinion in the district court. Furthermore, as noted by the Court of Appeals, there were, in the Paul statement "only passing references to Torrance (the petitioner here), none of them notably prejudicial or incriminating. At most Paul's testimony may have created an overall impression that Torrance as a member and officer of the Turnpike Commission participated in a number of the transactions upon which the indictments were founded. The trial judge dealt with this situation by clearly instructing the jury to consider Paul's statement as evidence against Paul alone."

Petitioner cites no federal decision in which it has been held that a state court's admission of the statement of a co-conspirator, under appropriate limiting instructions, is a denial of due process. Since this Court found no infirmity when a similar practice was followed in the federal courts, *Delli Paoli v. United States*, 352 U.S. 232 (1957), it should not be quick to condemn the practice in the state courts, particularly in this case, where the cautionary instructions were repeated on a number of distinct occasions and where the alleged prejudice to this petitioner from the statement itself was *de minimis*. As said in *Hoag v. New*

Jersey, 356 U.S. 464, 465 (1958), "... it has long been recognized as the very essence of our federalism that the states should have the widest latitude in the administration of their own system of criminal justice."

The inflated nature of petitioner's claim can be judged from the extreme lengths to which he has felt it necessary to go at the beginning and end of his Reasons for Granting the Writ. He opens by stating: "Because the ruling complained of permitted the State to use testimony known to the prosecutor to be false, the decision of the Court of Appeals that the ruling presented no constitutional infirmity is in conflict in principle with *Napue v. Illinois*, 360 U.S. 264 (1959)." The innuendo is that knowingly false testimony was used, and that this was raised as an issue before the Court of Appeals. Not only is the record devoid of any evidence that knowingly false testimony was used, but also petitioner never even raised it as a constitutional issue, either in the state courts or in the District Court or Court of Appeals and it is not raised by the Question Presented here. Reference to "innuendos and factual misstatements" in the Question Presented is a far cry from charging the use of testimony "known to the prosecutor to be false." And again the testimony was used *only* against Paul, not against the petitioner.

A greater exaggeration occurs at the close of the petition, wherein petitioner is compared to Socrates and Jesus.

Argument

CONCLUSION

For the foregoing reasons the petition for certiorari ld be denied.

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